UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

IAN POLLARD, on behalf of himself and all others similarly situated, Plaintiff, v. REMINGTON ARMS COMPANY, LLC, et al., Defendants,	)))))))))))	Case No. 4:13-cv-00086-ODS **OBJECTION** **TO CLASS ACTION SETTLEMENT**

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THE SETTLEMENT, IN CONTENT AND IN MANNER OF DELIVERY, FAILS IN ITS CORE PURPOSE OF REPAIRING DANGEROUS, DEFECTIVE GUNS

This Settlement should not be approved. A Settlement that offers a trigger repair but leaves almost all of the 7.5 million dangerous rifles unrepaired is a failure. As stated by the proponents of the Settlement (in their response to the objections of Belk, Pennington, etc. at p. 13, footnote 18, final sentence) (Doc. 108): "…the primary Settlement relief consists of a retrofit that addresses the core safety claims in the plaintiffs' complaint." At present, the Settlement fails in this core purpose. As will be discussed further herein, the Settlement, as it is currently structured, fails for two primary reasons: its contents and the manner of delivery.

Briefly, the contents of the Settlement are deficient in that it does not provide for the repair of all defective guns; some guns and some Classes of gun owners are excluded (or receive a voucher). The Settlement is also deficient due to the manner in which it has been delivered. Notice has failed to reach, and almost appears to be designed to fail to reach, most of the Class. Of equal or greater concern is the fact that the numbers of Class members taking advantage of the Settlement is abysmally low. In addition to the failure of Notice, this likely results from the onerous requirements of the claims process, from the mixed messages communicated by Remington in simultaneously circulating Notice while denying that the guns are defective.

This Settlement offers the best, last, and only prospect for addressing the risks associated with these defective guns. If the Settlement is approved in its present posture, Remington will be released and the opportunity to assert pressure on Remington and to bring about repair of the guns will be forever lost. The responsibility of addressing the risk of harm presented by these defective guns falls on those who brought the suit, entered into the Settlement, and those who are responsible for ensuring that the Settlement achieves its fundamental purpose.

As explained by the country's leading notice expert, Todd B. Hilsee, the Class did not get the opportunity it deserved under the law to get the benefits being offered. The following headline illustrates the "message" that should have been boldly conveyed by the Settling Parties in individual mailed Notices and other forms of Notice that would actually "reach" the Class, clearly communicate the problem, and provide a convenient and palatable claims process.

Remington announces trigger defect in rifles.
Guns can fire without pulling trigger.
STOP USING YOUR RIFLE.
Get free trigger repair under a Court Settlement.

As detailed herein, only a few thousand, out of 7,500,000 or more Class members, filed claims—because the Class never had a real chance. The Class was not given its constitutionally required opportunity under Due Process or under Rule 23. Few, out of many, will have the dangerous trigger system removed from the rifles "that have defined and defended the American way of life for more than 200 years."[1] What happened to Remington's "General Rule Applying to All Firearms-the gun must be safe?[2]" In exchange for retrofitting a few thousand rifles, after deeply flawed Notice that leaves millions more rifles to kill and injure, Remington obtains a broad Release. The Settlement and Notice are dysfunctional shams.

While Remington and its now allied Class Counsel will argue that the Release does not apply to personal injury and personal property claims, Remington will most assuredly raise a defense (comparative fault or superseding, intervening cause) in any future personal injury, wrongful death, or personal property litigation because of a Class members' alleged failure to

[1] https://www.remington.com/rifles

[2] http://www.remingtondocuments.com/wp-content/uploads/2016/11/customercomplaints.pdf

take advantage of this Settlement. But what should trouble this Court the most when considering whether to approve the Settlement as presented is that the future personal injury and wrongful death suits, etc. could be avoided now, in this Court, with these Settling Parties, if Class members actually receive proper Notice in functional language *and* are offered an easy and encouraging process that they are not averse to in order to obtain the desired benefit, the elimination of the dangerous trigger system.

Under the present terms of the Settlement Agreement, this Court has jurisdiction over every unidentified and un-Noticed Class member, who has not requested exclusion. With that, under Section D, if the Court grants Final Judgment approving the Settlement, the Court will have foreclosed any future actions by Class members as the Settlement "shall be the sole and exclusive remedy for any and all Released Claims." Under the facts and law, this should not happen.

As will be delineated for the Court in this objection brief and within the attached and incorporated exhibits, one wonders what is more dangerous for the Remington rifle owners, the rifles themselves or approval of this Settlement.

For these reasons, and those that follow, Lewis Frost, a citizen of the State of Louisiana, a deputy sheriff and a Settlement Class Member who personally owns three Remington Model 700's, two of which, Serial #'s G7109500 and E6476800 have had the triggers replaced with aftermarket triggers because he was personally aware of, and witnessed, unintentional discharges by Remington Model 700's and the third, a Remington Model 700, Serial # 117392, in .243 Winchester caliber, remaining as manufactured by Remington, including the original trigger system; and Richard L. Denney, a citizen of the State of Oklahoma who personally owns three Remington 700 rifles with serial numbers C6304660, C6481798, and A6887655, all of which remaining as manufactured by Remington, (the "Objectors[3]") who object[4] to the Class action Settlement in *Pollard v. Remington Arms Company, LLC*, 4:13-cv-00086-ODS.

BACKGROUND

This case involves rifles that Remington has long known to be susceptible to an unintentional fire without a trigger pull, sometimes resulting in injury or death. About this there is no valid dispute; very recently published Remington documents prove the defects and Remington's knowledge over a span of decades. Despite the evident danger of the faulty firearms involved, the Notice Plan has utterly failed to inform the vast majority of Class members about the proposed Settlement, let alone that they may be in possession of a dangerous gun that may unintentionally fire without warning. In fact, the Notice Plan appears designed to provide Notice to as few Class members as possible, to limit promulgation of information about the dangerous defective characteristics to suppress participation, and to avoid compilation of information negative to Remington (such as the extent of prior unintentional discharges and resulting harm). Notice expert Todd Hilsee has described the Notice Plan as a mere gesture that would not be adopted if one desired to actually inform the absent Class members. Hilsee Aff.[5] ¶¶ 17-28; *See also, Amicus* Ltr. of T. Hilsee (ECF No. 134) ("Hilsee *Amicus* Ltr.") at p. 2, 4, 7,

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[3] *The Manual for Complex Litigation*, Fourth Section 21.643, defines the important role of objectors. "Settlement Objectors can play a useful role in the court's evaluation of the proposed settlement terms." "Objectors can provide important information regarding the fairness, adequacy, and reasonableness of settlements. Objectors can also play a beneficial role in opening a proposed settlement to scrutiny and identifying areas that need improvement. For example, an organization's objection in one case transformed a settlement from one in which the lawyers received a majority of the funds to one that primarily benefitted Class members." "The important role some objectors play might justify additional discovery, access to information obtained by Class counsel and Class representatives, and the right to participate in the fairness hearing."

Messrs. Frost and Denney also adopts by reference the various exhibits attached to Objectors, Richard Barber and Jack Belk's Objection.

[4] Exhibit 1A and 1B incorporated herein as if copied *in extenso*

[5] Exhibit 2 *in globo* incorporated herein as if copied *in extenso*

25. The Class has not been given a chance to participate despite the fact that they will be bound.

The Court has been understandably suspicious of the Settlement and Notice for a year now. On December 8, 2015, the Court cancelled the hearing for final approval of the Settlement in this action as a result of a very low claims rate. The Court noted at that time that it could not "conceive that an owner of an allegedly defective firearm would not seek the remedy being provided pursuant to this Settlement Agreement. Thus, this low response rate demonstrates the Notice process has not been effective." Dec. 8, 2015 Order (ECF No. 112) at 1. As of August 2, 2016, there were only 6,500 claims made by the approximately 7,500,000 to 7,800,000 Class rifles. That is a claims rate of less than 0.1%. Since that time, other than some evidence of weak response and more confusion, there is no indication that the Parties have taken any successful steps to meaningfully communicate with the Class. Hilsee Aff. ¶¶ 63-64, and 91.

This paltry response rate is directly attributable to the parties' failure to utilize physical mailed Notice to the fullest extent possible. Despite the fact that physical mailed Notice (including sending a claim form with the mailing) is widely recognized as the most effective form of Notice in Class actions—including by the parties' own claims administrator—the parties sent mailed Notice to only 2,571 Class members under the original Notice plan and to only 93,000 Class members under the re-notification, for a total reach of only 1.2% of the 7,500,000 total rifles owned by Class members. None of the mailings included claim forms. Another 1,000,000 Class members (approximately 13.9%) were allegedly "notified" by e-mail (with no click-to-claim feature), even if their physical mailing address was available. Remington certainly has the names and mailing addresses of hundreds of thousands of warranty card registrants. See *Garza v. Sporting Goods Properties*, W.D. Texas, Case NO. 93-01082 (A shotgun defect case against Remington where as part of a cash Settlement 263,000 warranty registrants were notified by mail, millions more by media, all of which Notices included a very simple claim form, and achieved claims for 820,000 guns out of a Class involving 8.5 million guns). Here, the parties have sent no direct Notice at all to nearly 85% of Class members, instead largely relying on fleeting internet banner ads and fine-print magazine ads. As demonstrated in detail in the Affidavit of Todd B. Hilsee, this patently deficient Notice plan is not the "best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and thus does not meet requirements of Due Process. And, while the Class is currently on track to receive just $420,000 in value[6], plaintiffs' lawyers ("Class Counsel") seek $12,500,000 in fees, costs and expenses, an outsized 97% of the benefit to the Class. Class Counsel are to be paid irrespective of the claims rate, eliminating any incentive of Class Counsel to maximize participation.

Even for those Class members who have received actual Notice of the Settlement, the claims process presents another discouraging hurdle for Class members who would otherwise make a claim. The claims period is poorly defined, and Class members are given no specific date on which it will end (and when it ends, the potentially millions of guns which the Settlement process failed to capture will remain in circulation and Remington will have no incentive to remedy the defect). In addition, the claims process is unnecessarily complicated and confusing, leaving Class members to guess as to what form their claims should take. Moreover, the improper disparate treatment of Class members adds to the confusion, as does the fact that police departments and government entities are inexplicably left out of the Settlement but not out of the Complaint.

[6] Based on approximate average value per rifle of $64.90. Declaration of Class Counse, Richard Arsenault, ECF No. 92-13, p.12-13.

Defects in the Notice and with the claims process are amplified by the mixed messages put forth by Remington. On one hand Remington says (as it has for decades) that its guns are not defective and that this case is a lawyer get rich scheme, yet Remington then half-heartedly sends so called "Notice" of an available repair or a *de minimus* voucher. Clearly, the not so subtle message is that "your gun is safe;[7] don't waste your time or part with your gun for purposes of this meritless defect claim by greedy lawyers". Thus, Remington's mixed message undermines the Settlement and the Court orders seeking to implement it. Remington's reported $2 million budget to counter media reports about the defect surely added confusion and acted as a deterrent to claims. That budget should have been added to the Notice budget in this case.

Finally, for those few Class members who hear about the Settlement, and then figure out how to make a claim, the relief to be provided is wholly inadequate. The purported Settlement benefits work to dissuade Class members from availing themselves of the Settlement. For some, sending their rifles to Remington, or the very few Remington Authorized Repair Centers scattered across the country, for an indeterminate amount of time does not encourage participation. For others, those whom Remington has proclaimed that their rifles are not "readily" repairable, vouchers of the kind provided for here (to be used only on Remington products) are inherently suspect as they serve to increase defendants' sales while providing customers with far less than face value in compensation. For all, a virtually worthless DVD on safe firearm handling practices is a slap in the face to Class members, given that this case is about Remington's sale of defective firearms that discharge on their own. To add insult,

[7] As it pertains to the Model 700 and Seven recall, (now Settlement Class B(1), Remington's own website still states "While Remington has the utmost confidence in the design of the XMP trigger, it is undertaking this recall in the interest of consumer safety to remove any potential excess bonding agent applied in the assembly process." https://www.remington.com/support/safety-center/remington-model-700-and-model-seven-Notice

Remington already offers a 20% discount voucher—a greater value than the Settlement vouchers—to anyone who visits their 700-series recall website but does not qualify.

Despite alternative methods of easily and economically delivering the desired benefit, the proposed Settlement fails to include a trigger repair/replacement program that does not require shipping consumers' guns away for unspecified periods of time or traveling potentially long distances to very few and geographically scattered authorized Remington repair facilities. Gunsmiths across the country could perform the repairs (as Remington's own recall experience shows would be successful). In its 1979 recall of the 600 series rifles, Remington issued Notice mostly by direct consumer notification, enabled owners to take guns to 173 gunsmiths around the country for local repair (which Remington estimated would take only 7 ½ to 10 minutes), resulting in 13% of the guns being fixed. That same percentage applied to *Pollard* translates to the repair of some 1,000,000 rifles.

LEGAL STANDARD

Before approving a Settlement, the district court must determine whether Due Process has been satisfied by the Notice and claims process and that the Settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). Factors for the Court to consider in this regard include "the merits of the plaintiff's case, weighed against the terms of the Settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the Settlement." *Van Horn v. Trickey*, 840 F.2d 604, 607 (8th Cir. 1988).

In investigating whether a Class action Settlement is fair, reasonable and adequate, the Court must act as a fiduciary "serving as a guardian of the rights of Class members." *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 932 (8th Cir. 2005). Accordingly, the Court must "exercise the highest degree of vigilance in scrutinizing proposed Settlement of

Class actions." *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 279 (7th Cir. 2002); *A Pocket Guide For Judges* (Federal Judicial Center, 2010) ("*Pocket Guide*") at 23 ("courts . . . have ruled that the Settlement terms of a Settlement Class action need careful scrutiny"); *Manual for Complex Litigation*, Fourth ("*Manual*") § 21.631 ("Counsel for the Class and the other settling parties bear the burden of persuasion that the proposed Settlement is fair, reasonable, and adequate.").

In particular, Class Settlements such as this one require extra review when they are reached prior to the Class certification stage. *Acosta v. Trans Union, LLC* (C.D. Cal. 2007) 243 F.R.D. 377, 397 ("Federal courts are inherently skeptical of pre-certification Settlements, precisely because such Settlements tend to be reached quickly before the plaintiffs' counsel has had the benefit of the discovery necessary to make an informed evaluation of the case and, accordingly, to strike a fair and adequate Settlement."); *In re GMC Pick-Up Truck Fuel Tank Products Liability Litig.* (3d Cir. 1995) 55 F.3d 768, 788 ("Where the court has not yet certified a Class or named its representative or counsel, [the assumption that the Settlement was the product of arm's length negotiations] is questionable."); *Polar Int'l Brokerage Corp. v. Reeve* (S.D.N.Y. 1999) 187 F.R.D. 108, 113 ("An early Settlement will find the court and Class counsel less informed than if substantial discovery had occurred. As a result, the court will find it more difficult to access the strengths and weaknesses of the parties' claims and defenses, determine the appropriate membership of the Class, and consider how Class members will benefit from Settlement.") (citation omitted).

ARGUMENT

I. THE NOTICE PLAN IS FATALLY DEFICIENT IN FACT AND LAW

"Notice is a critical part of Class action practice" because "[i]t provides the structural assurance of fairness that permits representative parties to bind absent Class members." *Manual*

§ 21.31. The United States Supreme Court has explained that Due Process requires Notice to be the "best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 812 (1985); see also *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). Class action Settling Parties may not just go through the motions and satisfy Due Process. "But when Notice is a person's due, process which is a mere gesture is not Due Process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane* at 315 (citations omitted).

Here, however, the Proposed Settlement appears designed to provide Notice to as few Class members as possible. The Parties' very limited use of direct Notice by physical mail will result in reaching only approximately 95,000 Class members, or about 1.2% of the 7,500,000 total Class members.[8] The Notice Plan fails Rule 23's "best practicable" requirement because of (a) a failure to mail Notice to all those reasonably identifiable, and (b) a failure of Notices to deliver required content (the banner ads and social media have only a several-word headline). *See* Hilsee Aff. ¶¶ 29-58; *see also* Hilsee *Amicus* Ltr. at 9-14. For these reasons, and others detailed below, the Notice Plan implemented by the parties in this case is grossly inadequate and fails to comply with Due Process. Mr. Hilsee's observations raise serious concern that the Notice effort does not reflect the Due Process-required "desire to inform" standard. Hilsee Aff. par. 17-28 and Hilsee *Amicus* Ltr. at p. 2, 4,7, and 25. Indeed, though the Settling Parties submitted a Joint Response to Mr. Hilsee's *pro bono* July *Amicus* Letter, his opinions have not

[8] These figures include the 2,751 postcards mailed to Class members as part of the first round of Notice (those individuals who had previously paid for a trigger replacement), as well as the 93,000 postcards mailed to Class members as part of the supplemental round of Notice still in progress.

been rebutted. Hilsee Aff. *in extenso* and including ¶¶ 74-89, and the results of the Re-Notification—certain to be a small fraction of the Class who could be reached and could respond, will speak for themselves.

A. The Response to the Notice Has Been Caused To Be Unacceptably Low By Failure To Communicate And Provide Opportunity To The Class

The best way for this Court to judge the success of the Notice plan in this case is to analyze the number of claims submitted and the effort undertaken. See *Kaufman v. American Exp. Travel Related Services Inc.* (N.D. Ill. 2012) 283 F.R.D. 404, 407 ("In the Preliminary Approval Order …, the court found the Notice plan … to be adequate to provide meaningful Notice to the Class members…. But the abysmal response rate has prompted the court to reconsider that decision."); *see also* Federal Judicial Center's Judges' *Class Action Notice and Claims Process Checklist* at 7 ("Did the Notice plan achieve what it promised? Look for evidence that the Notice Plan reached the Class members as well as anticipated."). To date, the response rate resulting from the Notice plan in this case is alarmingly paltry. As of August 2, 2016, only ***6,500 claims*** have been submitted despite ***7,500,000 purchases*** of covered Remington rifles during the Class period. *See* 8/2/16 *Evidentiary Hearing Transcript*, Plaintiff's counsel at 40, ("Claims have gone up to over 6,500..."). Even if after the "Reminder" Notice ordered in August, the claims reach 75,000, the claims would constitute **only 1% of the Class, leaving 99% or 7.4 million dangerous rifles unrepaired.**

Rather than acknowledging and seeking to address the incredibly low number of claims, Remington and Class Counsel disingenuously tout the Notice plan and its alleged success. Conversely, Class Counsel criticize their own Settlement and claims process in their attempt to explain why less than 1% of the Class actually submitted a claim by speculating that "owners of firearms may be skeptical of any process that they perceive as analogous to firearms registration…other issues that may be impacting participation rates in this case include rifle owners not wanting to part with a firearm they use for personal protection, not wanting to part with a firearm during hunting season, or generally being suspicious of litigation and the government…some may not want not want a new trigger connector, despite the allegation that their trigger connector is not safe." 6/10/16 *Joint Supplemental Brief* Pursuant to The Court's Order of December 8, 2015 at 5.

If the proponents of the Settlement were aware of these predictable characteristics and concerns of the Class, why did they fail, in crafting the Settlement and Notice, to anticipate and address the response or lack thereof by the Class? Based on the proponents' assertions one might infer that the Settlement and Settlement process were contrived to deflate the participation rate. If it is in fact correct, that gun owners will not avail themselves of a Settlement that requires relinquishment of their guns, then the Settlement that the proponents have crafted is unsupportable. If what the proponents posit is correct, then the Settlement itself, the mix-message denials of a defect, the Notice, and the claims process should have been properly addressed. If true, what does the Settlement accomplish, other than providing a Release to Remington and fees to Class Counsel?

The broad contention that gun owners are simply unlikely to submit a claim is further refuted by the results of the quality Notice plan implemented in a similar gun defect Class action against Remington, *Garza v. Sporting Goods Properties*, W.D. Texas, Case NO. 93-01082, which produced claims for 820,000 guns. Hilsee Aff. Ex X. *Garza* demonstrates that gun owners will respond to a Settlement and claims process that reaches Class members, communicates the imperative of addressing the defect, and provides an adequate Settlement benefit without an onerous claims process.

In *Garza*, plaintiffs alleged the barrel steel was defective in 8.5 million shotguns, leaving them prone to explode. In the 1996 Settlement, Remington agreed to stop using this steel, provide a shotgun safety bulletin for all Class members who filed claims, and pay $31.5 million into a fund to be distributed to all Class members who made claims. Notices were mailed, together with claim forms, to 263,000 warranty registrants. The media Notices reached tens of millions, and were attention-getting. Claim forms were submitted for 820,000 guns - a claims rate of 8.8%. The genesis of the low claims rate in the current action is not that gun owners are inherently unwilling to submit claim form, but rather that (a) the Settlement proposed here provides and inadequate benefit; (b) the Notice is deficient; (c) the claims process is onerous; (d) and Remington – through on-going denials of clearly proven defects – has suppressed the response of Class members.

Courts across the country have routinely rejected Settlements due to a low claims rate. In *Figueroa v. Sharper Image Corp.* (S.D. Fla. 2007) 517 F.Supp.2d 1292, a Florida district court refused to approve a Class action Settlement where the claims rate was "less than one percent of the total Class." *Id.* at 1318; *see also id.* at 1327 ("Given the very low numbers of Class members who have responded with interest to the Notices provided – less than one percent – the [court] must agree with objector Potter that the Class has spoken and expressed it is not interested in this coupon Settlement."). Similarly, in *Kaufman*, an Illinois district court refused to approve a Settlement where the "[r]esponse to the Notice has been very low." 283 F.R.D. at 406. The court noted that the "low response rate is echoed in the low rate of claims by Class members." *Id.* The court found that only 3,456 claims had been submitted, totaling $41,510.35, which was "only slightly more than one percent of the $4 million available in the Settlement Fund for Class member claims." *Id.* Courts are finding out that low claims rates do not just "happen"—but rather they are the product of weak effort and poor Notice and claims processes that are seemingly designed to fail, as the *Kaufman* court learned when it retained its own Notice expert. *Id.*

Class Counsel and their now allied Defendants will argue that the claims rate is low because gun owners are averse to "registration" processes and reluctant to relinquish their weapons. Then why did they agree to require Class members be subjected to such a process? The Federal Judicial Center's ("FJC") *Judges' Class Action Notice and Claims Process Checklist* warned that "parties may negotiate a claims process which serves as a choke on the total amount paid to Class members." The FJC *Checklist* further warns about "claims process that deliberately filter valid claims." "Close attention to the nature of a necessary claims process may help eliminate onerous features that reduce claims by making claiming more inconvenient. *Id.* Based on the information this Court has in the present matter, it should conclude that the Notice Plan and the claims process was inadequate.

B. The Parties Failed to Provide Individual Notice to Millions of Easily Identifiable Class Members

1. The Type of Notice Was Not the "Best Practicable Under the Circumstances" As Required By Law

An obvious reason for the low claims rate in this case is that Class Counsel and Defendants made virtually no effort to functionally communicate with the Class by providing direct individual Notice to approximately 80% of the Class.[9] The United States Supreme Court has held that the parties to a Class action Settlement must provide "***individual Notice to all***

[9] The FJC *Checklist* specifically warns about overlooking meaningful individual mailed Notice. ("Look closely at assertions that mailing are not feasible…If individual Notice will not be used to reach everyone, be careful to obtain a first-hand detailed report explaining why not.") FJC *Notice Checklist* at 2.

members who can be identified through reasonable effort." *Eisen v. Carlisle & Jacquelin* (1974) 417 U.S. 156, 173 (emphasis added). In that case, the Supreme Court held that "the names and addresses of 2,250,000 Class members [were] easily ascertainable, and there [was] nothing to show that individual Notice [could not] be mailed to each." *Id.* at 175. The Supreme Court declared that "individual Notice to identifiable Class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23…. Accordingly, each Class member who can be identified through reasonable effort must be notified…." *Id.* at 176. Missouri courts have reached the same conclusion. See *State ex rel. Byrd v. Chadwick* 956 S.W.2d 369, 390 (Mo. Ct. App. 1997) ("[T]he court shall direct to the members of the Class the best Notice practical under the circumstances***, including individual Notice all members who can be identified through reasonable effort.***") (emphasis added); *State ex rel. American Family Mut. Ins. Co.*, 106 S.W.3d 483 (S.Ct. Mo. 2003) ("The idea of Notice, as prescribed in the Class rule, is that the best practicable Notice will be given to members of the Class who are not named as plaintiffs. This ***includes Notice to all those whose names and addresses are known.***") (emphasis added).

Courts throughout the country agree that physical mailed Notice is the best practicable form of Notice. *Poehler v. Fenwick*, 2015 WL 9258448, at *3 (D. Ariz. Dec. 18, 2015) ("first Class mail is typically the best practicable method of Notice"); *Lundell v. Dell, Inc.*, 2006 WL 3507938, at *1 (N.D. Cal. Dec. 5, 2006) (Notice that included first Class mail sent directly to Class members constituted the "best practicable notice" and satisfied Due Process requirements); *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995) (finding Notice sufficient where each Class member was notified by mail); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975) ("[T]he Supreme Court [has] specifically held that individualized

Notice by mail to the last known address was the 'best Notice practicable' in a Class action contest."); *Smith v. Am. Greetings Corp.*, 2016 WL 362395, at *3 (N.D. Cal. Jan. 29, 2016) (parties "sufficiently provided the best practicable Notice" where they "mail[ed] Notice to the Class members via first Class mail"); *Manual* § 21.311 ("When the names and addresses of most Class members are known, Notice by mail usually is preferred.").

Direct Notice through e-mail, on the other hand, has often been found insufficient where physical mailed Notice was possible. See, e.g., *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 91 (E.D.N.Y. 2007) ("the Court is not persuaded that Notice to Eligible Class Members by electronic mail, though clearly more convenient and less expensive for the parties, is an adequate substitute for the traditional method of notifying prospective Class members by first-Class mail."); *Sharma v. Burberry Ltd.*, 52 F. Supp. 3d 443, 463 (E.D.N.Y. 2014) (denying request to disseminate Notice by e-mail and finding that "first-Class mail is an adequate means to disseminate the Notice"); *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 630 (D. Colo. 2002) (rejecting request to notify Class members by e-mail and noting that "[w]here it is important to ensure that the most accurate Notice possible is provided to the proper audience, notification by first Class mail is the preferred method in the unique circumstances of Class certification notification" because "[s]uch a mailing process ensures the integrity of a judicially controlled communication directed to the intended audience"). Though e-mail Notice may be appropriate in some instances, or as an adjunct to mail Notice, it has not been effective here.

Even Steven Weisbrot, the Parties' own claims administrator, notes in a publication he co-authored that "[e]mail Notices tend to generate a lower claims rate than direct-mail Notice." Hilsee Aff., Ex. F. In this publication, Mr. Weisbrot lists e-mail Notice as the least effective means, and less effective than six different forms of physical mailed Notice:

> E-mail notices tend to generate a lower claims rate than direct-mail notices. But not all direct-mail notices are created equal — many types of notice and claim form designs exist, and they all tend to have different claims rates. The claims rates of the varying types of notice and claim form designs tend to be most impacted by their distribution methods, their ability to be easily understood by recipients, and the ease with which class members can file the necessary forms and take any required action.
>
> The following are the most common types of e-mail and direct-mail notices and claim forms. They're listed in order of least to most likely to increase the number of claims filed in a settlement.
>
> - E-mail notice
> - Single postcard summary notice
> - Full notice and claim form
> - Full notice and claim form with return envelope
> - Full notice and claim form with postage-paid return envelope
> - Double postcard notice with tear-away claim form
> - Double postcard notice and postage-prepaid tear-away claim form

Id. These facts are well-known in the claims administration industry. For instance, the nation's oldest claims administrator, Analytics LLC, recently provided data to the Federal Trade Commission showing that all forms of stand-alone mailed Notice greatly outperform e-mail Notice and all other forms of publication Notice including internet banner ads." *See* Hilsee *Amicus* Ltr., Ex. 2. This data reveals that "mailed Notice generates between an 800% and 3,000% response increase relative to digital ads and 375% to 800% relative to e-mail." *Id.* Likewise, the Direct Marketing Association ("DMA") has found that the rate at which e-mails are even opened ranges from a low of 7-8% to a high of 23-24% and have a response rate of just 0.1%. Hilsee *Amicus* Ltr., Ex. 3. One Class Counsel even admitted that he does not open many of the e-mails that he receives: "I don't know about other folks in this room, but I delete a lot of e-mails without looking at them." Tr. of Aug. 12, 2016 Hr'g at 56:6-8.[10] SPAM software

[10] The claims administrator possesses a significant trove of information regarding e-mail Notice in this case. Accordingly, among a great deal of missing Notice-related data, the Court should request:

would also preclude many Class members from receiving e-mail Notice.

Despite the fact that this information is well-known within the industry, "some administrators do not push settling parties to utilize physical mailed notice because it costs more and it seems they fear losing the administration contract if they insist upon it." But cost is not a valid excuse for failing to directly notify Class members in the best way practicable. As the Supreme Court has noted, there is nothing "to suggest that the Notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); *Abrams v. Interco Inc.*, 719 F.2d 23, 30 (2d Cir. 1983) (Friendly, J.) ("the expense of sending the Notice must be paid by the plaintiffs no matter how disproportionate this would be to their prospective individual recoveries"). Accordingly, the expense of physical mailed Notice is not a valid excuse for relying solely on Notice via e-mail. *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 92 (E.D.N.Y. 2007) (rejecting argument that mailed Notice would not be economically viable given the size of the Class because the "law is quite clear that concerns about the financial burdens of such Notice cannot excuse noncompliance" with Notice by the best means practicable); *W. v. Carfax, Inc.*, 2009-Ohio-6857, ¶ 37 ("Obviously, notification by e-mail is more convenient and less expensive. However, 'the law is quite clear that concerns about

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> Copies of the e-mails as sent; the number of e-mails returned as undeliverable; a description of the treatment of and actions taken because of returned e-mails; the number of e-mails where a physical mailing could have been sent; the number of e-mails sent but not opened; a description of the treatment and actions taken because of e-mails sent but not opened.

Hilsee Aff., Ex. D.

Email is a particularly poor choice for this settlement in that internet firewall software commonly blocks users from accessing gun-related websites like the settlement website where claim forms were to be found.

Hilsee Aff. Ex. EE.

the financial burdens of such Notice cannot excuse noncompliance with that requirement.'") (quoting *Karvaly v. eBay, Inc.*, 245 F.R.D. 71 (E.D.N.Y. 2007)). In any event, physical mailed Notice in this case would only cost 32 cents per claim form.

In this action, 90% of the few Class members being sent individual Notice, a small fraction of the total Class members, are being sent e-mails, not postal mail. Postal mail should be used if mailing addresses are available, and experts (including the proponents' own Steven Weisbrot) agree that mailed Notice has a much higher open rate and response rate than e-mails. The proponents of the Settlement have introduced no evidence, and no representations have been made that the mailing addresses for the e-mailed Class members are not available from Remington's own files (warranty cards, call center records, service repairs, etc.) They have not rebutted Mr. Hilsee's suggestions to explore third-party sources that may possess millions of names and addresses of Class members, and who may be willing to assist as courts and administrators routinely require in Class action Notice practice. Hilsee Aff. Ex. BB.

2. Individual Notice Was Not Sent to Class Members Who Could Be Identified Through Reasonable Efforts

During the first round of Notice in this action, conducted in May and June 2015, individual Notice was only sent to 2,751 Class members who had previously paid for a trigger replacement by Remington. ***No individual Notice was sent to those identified in warranty card or other databases.*** Clearly, Remington (which possesses registration cards and a marketing team) and Class Counsel (who could have conducted discovery and could have accessed third party data) did not avail themselves of the best practicable means of promulgating Notice or of getting guns repaired.

In the on-going supplemental round of Notice, Remington is sending approximately 93,000 postcards to potential Settlement Class members for whom it has been able to locate a mailing address, and 1,000,000 e-mails to potential Class members for whom it has been able to locate an e-mail address. After the supplemental round of Notice, the total number of individuals receiving direct mailed Notice is approximately 95,751. Even if all persons to whom the supplemental (or "reminder") direct mail Notice was directed received Notice, this effective (and highly unlikely) 1.2% reach would not satisfy Due Process – and would do almost nothing to address the grave dangers the suit was intended to address.

The Parties' Notice Plan is deficient in that they fail to make any reasonable effort to contact Class members individually. Most telling is the failure to utilize Remington's own warranty registrations and repair requests. As is the case with many consumer products, Remington provides with each rifle a warranty card to be completed and returned with the gun purchaser's name, address, and information about the exact rifle purchased. *See* Hilsee *Amicus* Ltr., Ex. 1 (Remington's own Warranty Card shows it captures a purchaser's mailing address.). The failure to use available addresses signals a *deliberate intention* to limit the Notice. Significantly, the use of warranty cards as a means of providing individual Notice is not a new concept for Remington. In the *Garza* action, warranty card registrants were sent direct individual Notices based on the information provided on their warranty cards. Hilsee Aff. Ex. U. The result was a 9.6% response rate in *Garza.* In 1979, a Remington recall that relied on direct consumer notification--and local gunsmith doing repairs--resulted in a 13% response rate, a rate which would yield almost 1,000,000 claims in this case. *Id.* Failing in their burden, no explanation has been provided by the aligned parties as to why the warranty cards are not being used to identify *Pollard* Class members.

In addition to warranty card data, the Parties could have utilized third party records to provide direct individual Notice "through reasonable efforts." For example, Remington dealers and retailers are required to keep ATF Form 4473s for all gun purchases. These forms show the firearm purchased, as well as the name and address of the purchaser. But the Parties made no effort to engage Remington's own dealers for assistance. The parties could also have identified Class members through the use of state hunting license data, or through NRA mailing lists. *See* Hilsee Aff., Ex.. G (NRA Privacy Policy webpage as of 11/13/16, stating that the NRA compiles "lists for communications and marketing purposes" and "will provide that information to NRA affinity partners who we believe provide goods and/or services that might be useful to NRA members.").

Such information is routinely used in marketing, and, moreover, courts have required the use of such data for Notice such that Remington and Class Counsel would be hard pressed to argue that obtaining the data was too burdensome. For instance, in *Oppenheimer Fund, Inc. v. Sanders* (1978) 437 U.S. 340, the Supreme Court held that it was reasonable to require the parties to incur the cost to "sort manually through a considerable volume of paper records, keypunch between 150,000 and 300,000 computer cards, and create eight new computer programs for use with records kept on computer tapes that either are in existence or would have to be created from the paper records…." *Id.* at 345. And, as noted above, cost is not a valid excuse for failing to directly notify Class members in the best way practicable. As the Supreme Court has noted, there is nothing "to suggest that the Notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974); *Abrams v. Interco Inc.*, 719 F.2d 23, 30 (2d Cir. 1983) (Friendly, J.) ("the expense of sending the Notice must be paid by the plaintiffs no matter how disproportionate this would be to their prospective individual recoveries").

Accordingly, the expense of physical mailed Notice is not a valid excuse for relying solely on ineffective Notice via e-mail. *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 92 (E.D.N.Y. 2007) (rejecting argument that mailed Notice would not be economically viable given the size of the Class because the "law is quite clear that concerns about the financial burdens of such Notice cannot excuse noncompliance" with Notice by the best means practicable); *W. v. Carfax, Inc.*, 2009-Ohio-6857, ¶ 37 ("Obviously, notification by e-mail is more convenient and less expensive. However, 'the law is quite clear that concerns about the financial burdens of such Notice cannot excuse noncompliance with that requirement.'") (quoting *Karvaly v. eBay, Inc.*, 245 F.R.D. 71 (E.D.N.Y. 2007)).

Here, the Parties have not made any effort to show that it would have been unreasonably difficult to provide individual Notice to more than 1.2% of the Class. In fact, there is no evidence that Class Counsel or Defendants even made any inquiries to third parties regarding the availability of Class member information. Accordingly, the Court should find that the Notice Plan failed to provide adequate Notice to the Class because Class Counsel and Defendants made no effort to provide direct Notice to millions of easily-identifiable members of the Class.

C. The Notice Plan Does Not Have Sufficient Reach

"The lynchpin in an objective determination of the adequacy of a proposed Notice effort is whether all the Notice efforts together will reach a high percentage of the Class." *Judge's Notice and Claims Process Checklist* ("FJC Checklist"). Under today's Notice standards and FJC guidelines, the Notice should be designed to reach close to 95% of the Class, with repetitive attention-getting exposures. "A study of recent published decisions showed that the median reach calculation on approved Notice plans was 87%" *Id.* While the Parties contend to have reached 73% of Class members, Class action Notice expert Todd Hilsee has shown this figure to be significantly inflated by demonstrating the settling parties Notice vendors' opinions (who are lawyers not mass communications experts and unqualified to render expert opinions on the reach) to be erroneous. Hilsee *Amicus* Ltr. at 20 and Hilsee Aff. Exs. O, P and Q. According to Mr. Hilsee's analysis, the Notice Plan only reached at best 49%, leaving half of the Class unaware of a dangerous defect. *Id.*

The inadequacies of the Parties' direct Notice plan cannot be remedied by Notice through print publication or digital advertising.[11] Regardless, Mr. Hilsee has identified several issues with the design and content of the print and internet Notice. First, the Notice did not have an attention-getting headline, something that would have dramatically increased Noticeability, readership, and thus response. *See, Id.* "It is important to capture attention with a prominent headline (like a newspaper article does). This signals who should read the Notice and why it is important." *FJC Notice Checklist*. In addition to the lack of a captivating headline, the print Notice also downplayed the safety concerns associated with a defective trigger mechanism, and therefore did not communicate a compelling reason to act.

Second, Mr. Hilsee notes an over-reliance on Internet banners.[12] Hilsee Aff. ¶¶ 59-73;

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[11] Publication is not an adequate substitute for Class members who could be reached directly. *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, 271 F.R.D. 139, 144–45 (N.D. Ill. 2010) ("*Mullane* stands for the proposition that "Notice by publication is not enough with respect to a person *whose name and address are known or very easily ascertainable* and whose legally protected interests are directly affected by the proceedings in question.'") (quoting *Schroeder v. City of New York*, 371 U.S. 208, 212–13 (1962)); *Mirfashi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (Notice by publication is only an acceptable substitute for direct individual Notice "[w]hen individual Notice is infeasible").

[12] As Mr. Hilsee previously pointed out to the Court, "[t]o compete, low bidders are providing erroneous calculations that overpromise effectiveness, thus appearing to achieve more, for less." Hilsee *Amicus* Ltr. at 23. One of these vendors' chief mechanisms for cost savings is reliance on internet banners. As the FJC Checklist warns, however, it is easy to overstate the effective of internet banners:

> **Is any Internet advertising being measured properly?**
> Audiences of Internet websites are measured by "impressions." Total, or "gross," impressions of the entire website do not reveal how many people will view the Notice "ad" appearing periodically

Hilsee *Amicus* Ltr. at 4-8. The Parties attempt to make up for the deficiencies in their direct Notice plan with Notice through Internet banners, but the *FJC Checklist* warns that claims of Internet banner exposure are regularly overstated in that many "impressions" are not actually viewed by humans.[13] And because Internet users must "click" on the banner to actually see the Notice, an unclicked banner is no Notice at all. *Id.* Very few people click banners—0.04% on average, and the Parties' *Facebook* purported click results before the Re-Notification are highly suspect. Hilsee Aff. ¶ 63, Hilsee *Amicus* Ltr. At 7.

Finally, the claims form, which has been described as "clumsy and confusing," "unnecessarily complex" and "akin to gun registration," is not designed to encourage claims. *Id.* In *Garza*, by contrast, the claim form employed was much more streamlined and straight forward. Hilsee Aff. Ex. E. As a result, the response rate in *Garza* was substantially greater than in this matter. Here, as in *Garza*, a significantly higher response rate could have been garnered

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> on a particular page. Inflated audience data via Internet ads is common. It is very expensive to reach a significant percentage of a mass audience with Internet banner ads. Watch for suggestions that Internet ads and social network usage can replace all other methods. Reach, awareness, and claims will likely be very low when such a program is complete.

FJC Checklist at 4. Accordingly, the Court should request detailed information from the parties about their use of internet banners, including purchase information and the names of the websites on which the banners apepared, the number of clicks on banner ads and the internet banner Notices themselves. Hilsee Aff., Ex. D.

[13] A study by Oxford University on advertising fraud found that 88-98% of clicks on Google, Yahoo, LinkedIn, and Facebook were not initiated by humans, but rather by computer-automated programs commonly referred to as "bots," Hilsee Aff. Ex. Y. The effectiveness of banner advertising has also been brought to the attention of the FTC by several United States Senators. *See* Hilsee Aff., Ex. K (Letter from Senator Mark R. Warner and Senator Charles E. Schumer to the FTC addressing ad fraud and falsified audiences of internet banners).

The Parties claim a digital reach of 16.5-17.4%. Mr. Hilsee, however, calculates a reach of only 12.3-12.4%.[13] Notably, the proponents of the settlement do not disclose the methodology for their calculation. Nor have either of their vendors ever been qualified as experts on mass communications as Mr. Hilsee has on dozens of occasions.

through a better Notice and a simplified claim process, either a postage-paid tear-off and return claim form, or by simply including a claim form in the mailing.

For these reasons, the failure to communicate shortcomings of the print and internet aspects of the Notice Plan leave much of the dangerous defective gun owning Class without Notice of the Settlement (or of their gun's dangerous defect), and contribute to the extremely low claims rate. While Internet banners and print publications can be useful for supplementing robust direct Notice plans, these cannot replace or overcome an inadequate direct Notice that violates Due Process because these are not the "best practicable" means of Notice nor "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action" so that Class members will be afforded "an opportunity to present their objections" or an opportunity to participate. *Metro. Life Ins.*, 2016 IL App (2d) 150236, ¶ 36. As such, the proponents of the Settlement and claims administrators should have pursued from the outset all reasonably identifiable mailing addresses before resorting to fleeting Internet banner ads and unassuming publications. Even "viewable" Internet banners (15-20 words) are defined as exposing audiences to Notice when "1/2 of the pixels are on screen for one second." The majority of banner ads are not viewable according to Google. Hilsee Aff. Ex. Z.

D. The Notices Misled Class Members to Feel Safe Thus De-Motivating Response.

As opposed to the headline on page 2 of this brief, the small percentage of Class members who received Notice saw a Notice that not only downplayed the potential danger, but undermined any sense of urgency to take action and repair their rifle. A Settlement that offers a trigger repair has no value if the Notice highlights "economic loss" and includes Remington's insistence that the guns are safe. The messaging in the Notices was polluted with euphemism and denial language that diminished the perception of the importance of the problem which demotivated response. The Notices did not focus on safety and omitted important content. Hilsee Aff. ¶¶ 13, 19-20, 47, 51, 54, 56 and Hilsee *Amicus* Ltr at 14, 17, 25 and 27. These deficiencies are evident in all Notice documents: the Short Form Notice, the Long Form Notice, the Radio Script, the Reminder Notice (postcard and email) and the Original Banner ad and Facebook banner. Hilsee Aff. Exs. C, H, J, V, CC; Hilsee *Amicus* Ltr. Ex 4 The Notices failed to mention the ongoing recall for 600, 660, and XP-100 rifles where triggers can be fixed, while mentioning only the voucher available for these guns under the Settlement. Hilsee Aff. Ex. DD. In offering $10 and $12.50 vouchers, Notices do not mention that 20% discounts available at Remington recall site for ANYONE which can be worth far more than the Settlement vouchers. Hilsee Ex. EE. Many comments on the *Facebook* posts reflect the diminished importance that the Notices placed in safety and potential for injuries and deaths. Hilsee Ex. C.

The internal Remington company documents newly published by Public Justice at www.remingtondocuments.com call into serious question whether any language that undermines the potential safety hazard has a legitimate role in a Notice to Class members. And, Mr. Hilsee's opinions on the relevance of observations that gunsmith H. Jack Belk has made about gun owner confusion and misapprehension resulting from Remington's seemingly unfounded denials clearly illuminate the low response. Hilsee Aff. par. 58 and 91-92.

II. THE CLAIMS PROCESS IS FATALLY DEFICIENT AND SUPPRESSES PARTICIPATION

Assuming, *arguendo*, a potential Class member and Remington rifle owner received Notice of this preliminarily approved Settlement, the claims process that must be undertaken suppresses an actual response rate in these ways:

1. The relatively short time period to file a claim;

2. The requirement of relinquishment of the firearm from those persons who characteristically have an aversion to being without their gun, particularly during hunting season (especially with an undefined time frame within which the rifles must be repaired and returned)[14];
3. The fear of *de facto* national gun registration;
4. Disparate treatment of Class members; and
5. The failure to consider in all Settlement Classes the simple solution of compensating for proof of installation of an aftermarket replacement trigger, does nothing to actually put a dent in the elimination of the dangerous trigger system from an estimated 7,518,000 firearms currently in circulation.

For those select few that actually find out about this Settlement, even fewer will participate under the current Settlement process.

A. Problematic Claim Period

Section II(5) of the Fourth Amended Settlement Agreement defines "Claim Period" as "the time during which any Settlement Class Member may submit a Claim Form under the Settlement. The Claims Period begins upon entry of the Preliminary Approval Order and expires eighteen months after the Effective Date." This definition has two critical problems. First, eighteen months is an extremely short period of time to submit an anticipated 7,518,000 claim forms. Second, nowhere on the Notice does it explain when the Effective Date[15] will actually be

[14] An article in *Ammoland, Shooting Sport News*, of October 2, 2014 describes the problems with the Remington 700 recall at the time. First, the website did not properly identify serial numbers of guns that qualify for the recall, while Remington internal records did qualify rifles. Moreover, the recall time period for repair was then twelve to fourteen weeks. http://www.ammoland.com/2014/10/my-remington-rifle-recall-experience/#axzz4PMUqPQ37

[15] Section II(15) defines an "Effective Date" as the latest date on which the Final Approval Order approve this Agreement becomes final if: (a) if no appeal is taken or (b) after appeals exhausted. However, section (c) allows parties to make the Effective Date different than (a) or (b). How can Class members calculate the actual Effective Date? They cannot.

so that Settlement Class Members can calculate the eighteen month period in which to submit their forms. Many potential claims will be lost through the passage of time simply because a Settlement Class Member has not been notified of when the eighteen months begins.

B. Claim Forms Are Too Complicated and Cumbersome

Assuming a Class Member received Notice of this Settlement and spent the time to sift through the polluted, euphemistic denial language, designed to diminish the defect known about for decades[16], the Claims Process is confusing, complicated, and cumbersome. Section II(4) of the *Fourth Amended Settlement Agreement* (Doc. 138) on August 19, 2016 requires a Claim Form to be "substantially in the form set forth in Exhibit A." However, no criteria are provided to explain to the common gun owner what "substantially in the form" means. Are there particular requirements that must be included; if so, how would the Class member know? Is this a way for Remington to deem claims non-compliant and deny Claim Forms so to further suppress the actual number of rifles repaired?

The Claim Form process gets more confusing from there. Should a Class member decide to utilize one of the provided Claim Forms, there are six (6) different forms to muddle through, each with its own inherent problems.

To begin, all Claim Forms appear to contradict the express language of the Settlement. Each Claim Form advises that it "must be fully completed to receive any Settlement benefits" yet the Settlement documents require only that a claim be "substantially in the form of Exhibit A." Additionally, instead of cutting down the extent of the paperwork, knowing that increased effort decreases turn out, a Class member must submit a separate Claim Form for each rifle. To simplify the Claim Form process and in return encourage, rather than discourage, participation, the Claim Form should allow for multiple firearms to be identified on one page. The separate and particular Settlement Class Claim Forms also deter participation.

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[16] http://www.remingtondocuments.com/wp-content/uploads/2016/11/customercomplaints.pdf and http://www.remingtondocuments.com/wp-content/uploads/2016/11/fraudulentconcealment.pdf

C. Claim Forms Contain Language Not in the Settlement

1. Model 700 and Seven of Settlement Class A(1)

Doc. 138-1 (page 2-4 of 18) applies only to Model 700 and Model Seven rifles and Doc. 138-1 (page 9-11 of 18) only applies to Sportsman 78 and Model 673 rifles even though Settlement Class A(1) applies to "[a]ll current owners of Remington Model 700, Seven, Sportsman 78, and 673 firearms containing a Remington trigger mechanism that utilizes a trigger connector." These Claim Forms seek information not required, identified, or a condition of the Settlement. If a goal of the Settlement is, as it should be, to make dangerous rifles not fire without a trigger pull, through a replacement trigger mechanism, then why is there a section stating: "unless your firearm has been involved in an unintended or accidental discharge that resulted in personal injuries or property damage…, the benefits listed herein will not be provided until after the Parties' Settlement Agreement has been finally approved by court order…." While maybe it is Remington's intent to get the most dangerous of its rifles corrected first without the prerequisite of final Settlement approval, there is no such provision in the *Settlement* and this will inevitably cause confusion among Class members, which likely will result in still fewer claim submissions.

Another Claim Form provision that does not appear in the *Settlement* is a requirement that if a person's rifle fired without a trigger pull, the only option available to that person is to ship the rifle to Remington.[17] This is not established in the Settlement Class A(1) benefits, which does not call for ANY firearms to be shipped to Remington. Confusion and suppression of response is the result.

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[17] The proponents of the settlement know that Class members will be averse to parting with their rifles for undeterminable amount of time and are skeptical of a perceived firearms registration (Doc. No. 27, pp. 5-6) and should have either issued reimbursement for retrofitting the trigger with a trigger of the Class member's choice or for taken the rifle to a dealer of their choice for

2. Settlement Class A(2)

Doc. 138-1 (page 12-14 of 18) of Settlement Class A(2) applies to "[a]ll current owners of Remington Model 710, 715, and 770, firearms containing a Remington trigger mechanism that utilizes a trigger connector." This Claim Form as well seeks information not required, identified, or a condition of the Settlement. *See, supra.*

Again, another Claim Form provision that does not appear in the Settlement is a requirement that if your rifle fired without a trigger pull, the only option available to you is to ship the rifle to Remington. This is not established in Settlement Class A(2) benefits, which do not call for ANY firearms being shipped to Remington.

3. Settlement Class A(3)

Doc. 138-1 (page 17-18 of 18) of Settlement Class A(3) applies to "[a]ll current owners of Remington Model 600, 660, and XP-100 firearms containing a Remington trigger mechanism that utilizes a trigger connector." However, this Claim Form does not seek the information required by the Claim Forms for Settlement Classes A(1) and (2), nor does this Claim Form require Settlement Class Members to send their firearm directly to Remington if it fired without pulling the trigger.

4. Settlement Class A(4)

Doc. 138-1 (page 15-16 of 18) applies to Settlement Class A(4) which includes "[a]ll current owners of Remington Model 721, 722, and 725 firearms containing a Remington trigger

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the 7 ½ to 10 minute retrofitting with an available Remington trigger. (Remington company documents at p. 17-23 of Letter from Richard Barber to Judge Smith, Dec. 21, 2015, Doc. No. 113) mechanism that utilizes a trigger connector." Like the Claim Form for Settlement Class A(3), this Claim Form does not require Settlement Class Members to send their firearm directly to Remington if it fired without pulling the trigger.

5. Settlement Class B(1) and B(2)

Settlement Class B(1) applies to "[a]ll current owners of Remington Model 700 and Model Seven rifles containing an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014 who have not participated in the voluntary X-Mark Pro product recall." Settlement Class B(2) applies to "all current and former owners of Remington Model 700 and Model Seven rifles who replaced their rifle's original Walker trigger mechanism with an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014."

The bold caption of Doc. 138-1 (page 5-8 of 18) states that it applies to Settlement Class (B)(1) (Model 700 and Model Seven), but confusingly throws in Settlement Class B(2) in Section 5. This likely will suppress Class response for those eligible to take advantage of reimbursement because they will not see it on the form. This Claim Form also undertakes an effort to obtain information not required, identified, or a condition of the Settlement. The Claim Form asks if a firearm has fired without a trigger pull and, if so, the Class member can be sent a prepaid shipping tag to submit the firearm to Remington for inspection and retrofit. This is not a listed benefit in the Settlement, which provides for take in or ship to a Remington Authorized Repair Center ("RARC").[18] Additionally, as it pertains to Settlement Class (B)(2), the Claim Form seeks the identity of persons making repairs and uses the words "qualified to make rifle

[18] Section II30 of the Fourth Amended Settlement Agreement provides only twenty-four (24) RARC's throughout the entire country and although the Settlement calls for additional RARC's to be added to the Settlement Website as of this writing none have been added. Compare this to 1979 wherein Remington utilized 173 gunsmiths in the U.S. and Canada to conduct repairs. This current process is grossly insufficient.

repairs." The Settlement does not expressly provide for this requirement nor does it provide for a criteria to satisfy the "qualified to make rifle repairs" language.

III. THE SETTLEMENT BENEFITS ARE INADEQUATE, PROVIDE DISPARATE TREATMENT TO SETTLEMENT CLASS MEMBERS AND FAIL TO CONSIDER A SIMPLER SOLUTION OF REIMBURSEMENT FOR RETROFITTING WITH AFTERMARKET TRIGGERS

The (a) speed with which Settlement occurred, (b) the attorneys' fees versus the suspect benefit to the Class, and (c) the questionable Notice (both in terms of dissemination and with respect to messaging that undermines the proper goal of Notice) certainly support inquiry into whether the Settlement is, in fact, beneficial, or adequately beneficial, to the Class and consistent with the inextricably interwoven goals of public safety. The proponents of the Settlement cannot on the one hand, at page 3 of the Settlement Agreement, put forth that Remington informed plaintiffs' counsel "of certain limited conditions which could potentially cause [rifles] to discharge without a trigger pull" while at the same time releasing Remington in a conglomeration of defect denials, nearly worthless vouchers, and an abysmal Class participation rate, which will leave unaddressed (and obscured from public knowledge) the grave danger presented by millions of unrepaired, dangerous, defective guns. Overall, the Court should consider in its protective role that the Class does not benefit from a voucher for Remington products, from fees paid to Class counsel, or from a replace/repair program targeted to only repair very few of the dangerous, defective rifles.

A. The Settlement Benefits Are Inadequate

A review of the *Fourth Amended Settlement Agreement*, especially when compared to the Prayer in the *Complaint*, leaves one to question whether the purported "Settlement benefits" are aptly, or at all, beneficial to the Class. Proponents of the Settlement, in their submissions, seem to acknowledge that the benefit to the Class is of no great moment. In response to Todd Hilsee's

July 2016 letter raising issues as to the Notice and Settlement offer's value arising from its ability to prevent injuries, the proponents of the Settlement responded: "Had this been a personal injury action, I would harbor the very same grave concerns about Class member safety that Mr. Hilsee offers." Declaration of Steven Weisbrot, ECF No. 139-1. Aug. 19, 2016. Passing, for now, on commenting about the Class member safety implications, the response by the proponents of the Settlement seems to essentially suggest: "Who cares if Class members get the benefits – because those are insignificant." The message seems to be that the Settlement benefits are so insignificant that the Court should not care whether Class members get Notice of the benefits or avail themselves of the benefits. Absent effective Notice and a workable process that allow Class members to avail themselves of the Settlement benefits, no one benefits except Class Counsel in fees and Remington in a Release from the litigation. *In re TJX Companies Retail Sec. Breach Litig.*, 584 F.Supp.2d 395, 406 (D. Mass. 2008) ("Similarly, unscrupulous Class counsel may agree to conditions on a Settlement—such as a short timeframe in which to make claims or a burdensome claims procedure—in order to obtain additional concessions from the defendant that purportedly increase the value created by the litigation and that support an enhanced fee award. The defendant, meanwhile, may grant these concessions precisely because the conditions attached to them would make it unlikely that a significant number of Class members would cash in."). Even with proper Notice, however, in many respects the purported "benefits" of the Settlement do not match the circumstances that led to the case being brought.

The repair of the rifles (setting aside for now concerns raised by gun experts as to the efficacy of the repair and replacement trigger) through a workable means is required. A Remington product purchase voucher for $12.50 or for $10.00 does nothing to repair a defective rifle or prevent that defective rifle from unintentionally discharging.

The criticisms of vouchers in Class action Settlements are well-established. "[M]ore and more frequently, some are taking advantage of the system and, as a result, consumers are getting the short end of the stick, recovering coupons or pocket change, while the real reward is going to others." *Introduction to the Class Action Fairness Bill by Senator Kohl, January 24, 2005*. Here, Remington provides a voucher for the purchase of Remington products. As such, the voucher ultimately costs Remington less than the stated value because the vouchers are valued at retail while the cost to Remington is at wholesale. Most significantly, however, is the fact that the vouchers will probably never be claimed; who would do the work associated with the claims process to claim a $10.00 or $12.50 voucher redeemable only for Remington products? A voucher offer bears no relationship to the fundamental core of the claim by the Class, nor does it adequately compensate Class members for the inconvenience and expense associated with having had a trigger replacement.

In the context of disparate treatment of Class members, the court is urged to recognize that Remington has placed its defective trigger in an array of rifle models over many years; the slight variation in rifle of those models is wholly insignificant relative to what the guns have in common: a potentially life threatening trigger. There is simply no justification which would support the disparate treatment of Class members as would occur if the Settlement is approved as proposed. Every Remington rifle equipped with a defective trigger should be repaired. Absent this repair, the economic losses, on which the proponents of the Settlement focus, continue to occur unabated . . . as does the risk of harm to life and property. Every Class member who had a gun equipped with a defective trigger should receive equal benefit under the Settlement, the failure to do so demonstrates the unfairness of the Settlement. *In re Gen. Motors Corp.—Up*

Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 808-09. *Ferrington v. McAfee, Inc*., n0.: 10-CB-01455-lhk, 2012 U.S. Dist. LEXIS 49160, *26 (N.D. Cal. Apr. 6, 2012).

In addition to the disparate treatment of Class members owning guns covered by the Settlement, the Settlement should be rejected because gun owners who were covered in the Class definition set forth in the lawsuit as filed, are excluded from the Settlement. This includes guns owned by governmental entities (police) and also includes models 721, 722, 725, 720, 600, 660, XP-100 and several 600 series Mohawk Models. A fellow objector, Jack Belk, has also commented on the exclusion of certain Remington models from the Settlement. In addition to the contents of Mr. Belk's objection, the Court should also recognize the impropriety of excluding a group of Class members, governmental entities, from the Settlement. The disparate treatment of Class members under the Settlement, and the exclusion of persons encompassed within the original Class definition, should prompt the Court to decline to approve the Settlement.

In its submissions (*Settlement Agreement* at Paragraph 54(b) (ECF No. 138, page 20) and Plaintiffs' and Defendants' joint response to objection filed by Townsend, Pennington & Belt, p. 11, fn 14.), Remington reveals that the cost of replacing the trigger is in the $70.00 to $119.00 range. The revelation of these figures prompts several observations, including were the proponents of the Settlement permitted to proceed as they intended with a Notice yielding an abysmal take rate, the attorneys' fees would have far exceeded the benefit to the Class. This disparity has meaning. It demonstrates, at the least, that the purported Settlement benefit and the method of delivery are inadequate. Though there is an informational void as to how the fee figure was calculated, it is beyond tether that the Settlement in its present form does not have a value even remotely approaching 4-times the fee. See *Harris v. Vector Mktg. Corp.*, No. 08-

5198, 2011 WL 4831157, at *5 (N.D. Cal. Oct. 12, 2011) (stating that Settlement fund is "virtually illusory" given high unlikelihood that Class members will actually return sample knife kit to make claim from fund). This disproportionality signals that something is amiss. The Class is not being adequately compensated.

Lastly, all Settlement Class Members get a DVD on safe firearm handling practices that does not address Remington or its defective firearms specifically.

Though the Settlement is not characterized by proponents as effecting a relief of personal injury liability (and is presented as an "economic loss Settlement"), the Settlement nonetheless, if done correctly, most assuredly has potentially far-reaching public safety ramifications. Clearly, a successful trigger repair/replacement program (assuming the repair or replacement triggers cure the defect) will certainly increase safety and reduce the risk of proven harm. Moreover, though the Settlement excludes personal injuries from the Release, it cannot be said that the Settlement will be without effect relative to Remington's liability in future personal injury cases. One might anticipate that Remington would raise as a defense to a future personal injury case the failure of a gun owner to take advantage of the repair replacement provision of the Settlement. Remington would likely argue comparative fault or superseding intervening cause, such that the likelihood is that this Settlement will affect future personal injury claims (and it is also near certain that if this Settlement moves forward in its current posture, resulting in a low take rate, the Settlement, Notice and Settlement administration in this matter will come under scrutiny and/or collateral attack in future litigation). The Settlement should, but does not, express an imperative that the subject triggers be replaced. The Settlement is fundamentally flawed in this respect and therefore fails in the fundamental duty of protecting Class members, which in this case requires maximization of successful Notice communication to maximize the take rate and repair of the defective guns. Public safety is inextricably interwoven in this case, and must be recognized and acted on.

B. The Settlement Benefits Provide Improper Disparate Treatment to Settlement Class Members.

The Settlement will undoubtedly cause further confusion among Class members because of the disparate treatment and disparate values Settlement Class Members receive based solely on the type of rifles they own. Disparate treatment among otherwise identically situated Class members demonstrates the unfairness of a Class Settlement. See, *e.g., In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d at 808-09 ("[T]he relative inability of Class members to use the [Settlement] militates against Settlement approval."); *Ferrington v. McAfee, Inc.*, No.: 10-CV-01455-LHK, 2012 U.S. Dist. LEXIS 49160, at *26 (N.D. Cal. Apr. 6, 2012) ("[D]isparate treatment between Class members increases the likelihood that the Settlement agreement does not meet the Rule 23(e) standard."). Courts have refused to approve Settlements under which some Class members receive a benefit while others receive nothing. For example, in *Ferrington*, 2012 U.S. Dist. LEXIS 49160 at *30, the court refused to approve a Settlement under which a subclass of Class members would effectively be "releasing all of their claims without any compensation." The court explained that compensating some Class members while "extinguishing the [other Class members'] claims for no consideration would be unfair and unreasonable." *Id.* at *31-32. In *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781 (7th Cir. 2004), a negotiated Settlement contained a provision that would provide benefits to one subClass, while the other subClass received nothing and still Released all their claims. The Seventh Circuit reversed the district court's grant of final approval, in part because some Class members' claims were Released for essentially no consideration, despite having value. *Id.* at 783-85.

Members of Settlement Class A(1)[19] can only take or ship their rifles to an RARC for retrofit. The RARC will remove the original trigger and install a Remington X-Mark Pro. Members of Settlement Class A(2)[20] can only ship their rifles to Remington, **not to an RARC**, who will remove original trigger and retrofit with current Remington Model 770 connectorless trigger.

Members of Settlement Class A(3)[21] allegedly possess rifles that cannot be "readily" (whatever that means in the context of a defective, dangerous gun) retrofitted with a Remington connectorless trigger. These Settlement Class Members are provided no benefit that would remove the dangerous trigger system and avoid future deaths and injuries. Instead, Settlement Class Members receive a $12.50 voucher, which can only be redeemed for Remington products. These Class Members should be asking, "why do we only get a $12.50 voucher when another Class can receive full reimbursement, up to $119.00, for proof of replacement?"

Members of Settlement Class A(4)[22] also possess rifles that allegedly cannot be "readily" (whatever that means in the context of a defective, dangerous gun) retrofitted with a Remington connectorless trigger. These Settlement Class Members are provided with no benefit that would remove the dangerous trigger system and eliminate future harm. Instead, Settlement Class Members receive a $10.00 voucher which can only be redeemed for Remington products. Like

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[19] "All current owners of Remington Model 700, Seven, Sportsman 78, and 673 firearms containing a Remington trigger mechanism that utilizes a trigger connector."

[20] "All current owners of Remington Model 710, 715, and 770, firearms containing a Remington trigger mechanism that utilizes a trigger connector."

[21] "All current owners of Remington Model 600, 660, and XP-100 firearms containing a Remington trigger mechanism that utilizes a trigger connector," predominantly produced between 1962 and 1982.

[22] "All current owners of Remington Model 721, 722, and 725 firearms containing a Remington trigger mechanism that utilizes a trigger connector," produced between 1948 and 1961.

Class A(3), this Settlement Class should be asking, "why do I only get a $10.00 voucher when another Class can receive full reimbursement, up to $119.00, for proof of replacement?"

Members of Settlement Class B(1)[23] can take or ship their firearms to an RARC for retrofit. The RARC will remove the X-Mark Pro trigger and retrofit with a Remington X-Mark Pro assembled under "new" assembly process. This is the same as the voluntary recall process that has been ongoing.

Settlement Class B(2)[24] is the only Settlement Class that applies to both current and former owners who replaced the Walker Trigger, but only if it was replaced with a Remington X-Mark Pro manufactured from May 1, 2006 to April 9, 2014. These Settlement Class Members will get a refund not to exceed $119 but only if the trigger was replaced with a Remington trigger.

C. The Settlement Fails to Provide the Simple Solution of Reimbursement for Retrofitting with Aftermarket Triggers

The *Settlement* fails to consider the easier to provide, and economically advantageous approach, of utilizing an aftermarket "upgrade" trigger of the rifle owner's choice ($100-200), which can be installed by a gunsmith of the owner's choice in his or her city. Each one of these Settlement Classes could be provided this same benefit and accomplish the desired result: removing Remington's dangerous trigger system from existing firearms.

The means of availing oneself of the trigger replacement benefit under the *Settlement* does not appear to be calculated to maximize the number of Class members availing themselves

[23] "All current owners of Remington Model 700 and Model Seven rifles containing an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014 who have not participated in the voluntary X-Mark Pro product recall."

[24] "All current and former owners of Remington Model 700 and Model Seven rifles who replaced their rifle's original Walker trigger mechanism with an X-Mark Pro trigger mechanism manufactured from May 1, 2006 to April 9, 2014."

of the trigger replacement opportunity. The requirement that Class members use an RARC—the number and location of which are problematic (as discussed below)—as opposed to a local gunsmith impedes Class members' ability to avail themselves of the trigger replacement benefit. The limited number of Remington authorized repair facilities likewise is counter to the goal of maximizing the take rate – if that is the goal of the Settlement at all. Likewise, the requirement of potentially sending one's gun to Remington and being without the gun for an undisclosed, but likely extended, period is not calculated to promote the take rate.

IV. A COMPARISON TO THE SETTLEMENT AND NOTICE IN *GARZA V. REMINGTON* SHOWS THAT THE INSTANT PROPOSAL IS FATALLY FLAWED.

According to the proponents of the Settlement, the value of the retrofit provided to some, but not all, Class members is worth approximately $70.00.[25] As indicated by this Court, as of August 14, 2015, only 6,500 claims had been submitted. The math is simple: as of August 14, 2015, Remington had obligated itself to pay to the Class, at a maximum,[26] approximately $420,000. Yet, the benefit to the plaintiffs' lawyers would be $12,500,000 in attorneys' fees, costs and expenses. It is well known that after Notice is complete it is highly unlikely that claims submissions will dramatically increase.

In 1996, the United States District Court for the Western District of Texas, San Antonio Division, approved a Settlement related to allegedly defective barrels in Remington 12 gauge shotguns (the "*Garza* Settlement"). *Garza v. Sporting Goods Properties, Inc.*, No. 93-108, 1996 WL 56247 (W.D. Tex. Feb. 6, 1996) The plaintiffs' allegations centered on the inappropriateness of the type of steel used, and the asserted predilection of the shotguns barrels to burst.

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[25] Plaintiffs' and defendants' joint response to objection filed by Townsend, Pennington & Belt, p. 11, fn 14.

[26] This is assuming that all claims were valid and properly submitted.

According to the court in the published opinion, approximately 115 barrel failures occurred every year.

In the present case, the plaintiffs alleged that the Model 700 Remington rifle was defective because it would, on occasion, fire unexpectedly without the trigger being pulled. The plaintiffs alleged that this occurrence was significant enough, and frequent enough, that Remington itself coined descriptions of the mechanism: "FSR" or "fire on safety Release" and "FBO" is a "fire on bolt opening." Again, according to the plaintiffs' *Complaint* in this case, Remington received about 5 customer complaints per week about Remington Model 700 rifles firing without a trigger pull.[27]

Garza, like the present case, excluded personal injury claims. In *Garza*, however, Remington agreed not only to a cash payment of $31.5 million dollars but also agreed to design modifications and to issue safety warnings. In *Garza*, the parties engaged in what the court described as a "massive" Notice campaign. Not so in *Pollard*.

Here, only one year after filing suit in the present case, on July 2, 2014, the parties filed a joint Notice of Settlement, in which they informed the Court that the parties had reached a nationwide Class Settlement of the claims alleged in both the Class action complaint and the first amended Class action complaint.[28] The parties also moved for a protective order. In its denial of the protective order, this Court expressed skepticism regarding the motives of the parties in seeking to conceal information:

> Presumably, the parties already have been participating in discovery – at least, enough so that the parties know the strengths and weaknesses of their case and are in a position to have reached a Settlement. This is particularly true of plaintiff,

[27] This amounts to 250 per year, significantly higher than the fail rate reported in *Garza*.

[28] The first amended complaint created additional Classes and included, *inter alia*, Remington Model 600, 660, and XP-100 firearms.

> who is obligated to convince the court that the forthcoming Settlement is fair and reasonable and worthy of preliminary approval. This being the case, there seems to be little need for any additional discovery – and, thus, little need for a protective order to protect any future discovery.
>
> * * *
>
> Given that this case involves alleged design flaws with the Walker fire control trigger assembly, there is a strong public interest in not allowing the court's orders to be used as a shield that precludes disclosure of this danger. More importantly, given that the parties intend to propose a national Class action Settlement, there are strong fairness and due process concerns involved. The court will not keep information from the public about this suit or this Settlement, nor will the court conceal information from potential Class members.

But in *Garza*, the parties appear to have vigorously litigated until a Settlement was achieved. The case was ultimately settled for $31.5 million dollars in cash and an agreement by Remington to change the steel used in the barrel. There was no reverter, and the amount that Remington paid did not depend, as here, on the take or participation rate which has been shown to have been suppressed.

Given the "massive" Notice campaign described by the court which included direct mailed Notice (to an apparently extensive warranty card database that Remington has) and attention-getting media Notices—all with simple claim forms, attracted many, many claimants. According to correspondence from the court, 496,451 claims representing 820,708 shotguns were received.

The present case contrasts, and compares very badly, with *Garza*. Here, Remington certainly has no incentive to increase the take rate, as every rifle that is returned to Remington represents an additional cost. Whether or not Class members return the rifles for trigger replacement, all of their claims with regard to the rifles would be barred if the Settlement is approved. Further, plaintiffs' counsel have negotiated a clear sailing agreement for a

$12,500,000 fee[29], costs, and expenses for only one year of "work" producing an extraordinarily defective Settlement violative of the law.[30] What is the incentive of any of these parties to maximize the take rate? Remington, in fact, has an extreme disincentive to attract claimants.

Ignoring safety factors, the proponents of the Settlement now trumpet the notion that this is only an "economic damage" case and that therefore concerns with the Notice and the take rate are much ado about nothing, and that the public safety concerns have no bearing. But what are the benefits under this Settlement when compared with *Garza*, a Settlement from which personal injuries were also excluded? Here, certain Class members get a $10 voucher, a limited number can be reimbursed for previous repairs, and others receive an onerous process for having their triggers replaced. Reproduced below, taken from the Settlement website, is a map showing the few locations of authorized Remington repair facilities (24 versus the 173 in the 1970's recall).

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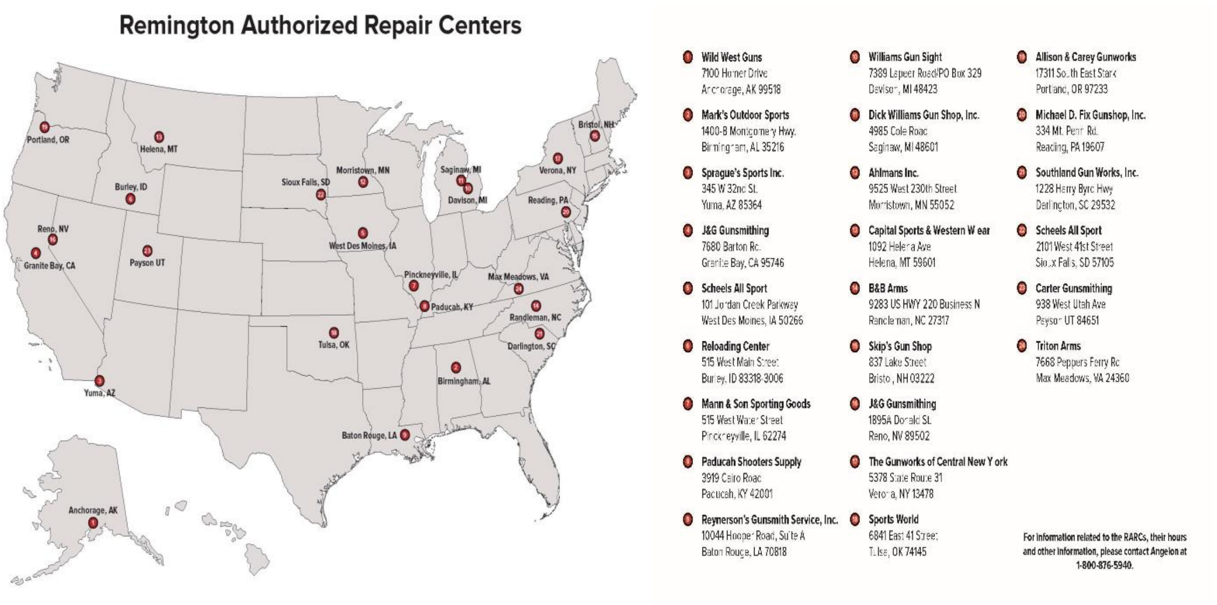
[29] Section VII of the *Fourth Amended Settlement Agreement*, provides "[i]n advance of the date set by the Court for Objections, Class Counsel agrees to request approval of an award of all attorneys' fees, costs, and expenses in a total amount not to exceed $12,500,000." This provision would have provided Objectors the ability to scrutinize the motion and include any objection in their formal objection by November 18, 2016. However, the Court's Order of August 23, 2016 inadvertently appears to relieve the Settling Parties of their contractual obligation and therefore deprives Objectors of the ability to scrutinize the request as now, Plaintiffs shall file a motion seeking approval of attorney fees on or before January 17, 2017.

[30] Much is made in the settlement and pleadings of the fact that the plaintiffs' lawyers had prior experience with Remington 700 rifle litigation. They are alleged to have accumulated large numbers of documents in connection with earlier litigation and to be intimately familiar with the rifle. However, that work was not done in connection with the *Pollard* claim, and presumably those lawyers were compensated earlier for the work done in those cases. This does not form a basis for compensation here.


Remington Authorized Repair Centers
Portland, OR
Helena, MT
Burley, ID
Reno, NV
Granite Bay, CA
Payson UT
Yuma, AZ
Anchorage, AK
Sioux Falls, SD
Morristown, MN
West Des Moines, IA
Saginaw, MI
Davison, MI
Pinckneyville, IL
Paducah, KY
Tulsa, OK
Birmingham, AL
Baton Rouge, LA
Max Meadows, VA
Randleman, NC
Darlington, SC
Reading, PA
Verona, NY
Bristol, NH
Wild West Guns 7100 Homer Drive Anchorage, AK 99518
Mark's Outdoor Sports 1400-B Montgomery Hwy. Birmingham, AL 35216
Sprague's Sports Inc. 345 W 32nd St. Yuma, AZ 85364
J&G Gunsmithing 7680 Barton Rd. Granite Bay, CA 95746
Scheels All Sport 101 Jordan Creek Parkway West Des Moines, IA 50266
Reloading Center 515 West Main Street Burley, ID 83318-3006
Mann & Son Sporting Goods 515 West Water Street Pinckneyville, IL 62274
Paducah Shooters Supply 3919 Cairo Road Paducah, KY 42001
Reynerson's Gunsmith Service, Inc. 10044 Hooper Road, Suite A Baton Rouge, LA 70818
Williams Gun Sight 7389 Lapeer Road/PO Box 329 Davison, MI 48423
Dick Williams Gun Shop, Inc. 4985 Cole Road Saginaw, MI 48601
Ahlmans Inc. 9525 West 230th Street Morristown, MN 55052
Capital Sports & Western W ear 1092 Helena Ave Helena, MT 59601
B&B Arms 9283 US HWY 220 Business N Randleman, NC 27317
Skip's Gun Shop 837 Lake Street Bristol, NH 03222
J&G Gunsmithing 1895A Donald St. Reno, NV 89502
The Gunworks of Central New Y ork 5378 State Route 31 Verona, NY 13478
Sports World 6841 East 41 Street Tulsa, OK 74145
Allison & Carey Gunworks 17311 South East Stark Portland, OR 97233
Michael D. Fix Gunshop, Inc. 334 Mt. Penn Rd. Reading, PA 19607
Southland Gun Works, Inc. 1228 Harry Byrd Hwy Darlington, SC 29532
Scheels All Sport 2101 West 41st Street Sioux Falls, SD 57105
Carter Gunsmithing 938 West Utah Ave Payson UT 84651
Triton Arms 7668 Peppers Ferry Rd Max Meadows, VA 24360
For information related to the RARCs, their hours and other information, please contact Angelon at 1-800-876-5940.

The Class members have no way of knowing whether Remington plans to keep the rifles for two days or two years. Further, a look at the map of authorized repair facilities, above, shows that many Class members would have to drive hundreds or thousands of miles in order to reach a repair facility. For instance, in one of the largest hunting meccas in the United States, the State of Texas, there is not a single authorized repair facility. The same is true for 27 states, and as the map shows, the facilities are functionally inaccessible for much of the U.S.

This may be an economic loss case now, when the proponents want to settle with Remington paying essentially nothing but attorneys' fees, but that is not the way the case started. The original *Complaint* tells the story. While the original lawsuit, like *Garza*, excluded damages for personal injuries, it emphasized how dangerous the guns are: "There have been more than 140 lawsuits filed against defendants involving serious injury or death as a result of a firing in the absence of a trigger pull of Remington bolt action rifles containing the Walker fire control." The Prayer is also instructive: Plaintiffs prayed for "judgment against the defendants for compensatory damages for themselves and each member of the Class, and for the establishment of a common fund, plus attorneys' fees, interest, and costs." The *Complaint* also stated a cause of action for unjust enrichment and asked that Remington be forced to disgorge all of the profits from the subject rifles. The plaintiffs further pled for an order enjoining the defendants from deceptive advertising and requiring defendants to replace the Remington Model 700 rifles "with a suitable alternative rifle of plaintiffs' and Class members' choosing," for full restitution to the plaintiffs for the cost of the rifle, and for various other damages. Currently, the Settlement has morphed into an ineffective Notice of a trigger replacement that has been made so inconvenient that it is likely, and perhaps devoutly hoped by the Parties, that very few members of the Class will avail themselves despite the fact that their rights will be terminated by the bar order. This is a total failure of due process

And it gets worse. Only certain Classes in the Settlement received the trigger replacement "benefit." Others will receive a $10.00 or $12.00 coupon to be used for purchases on the Remington website. The explanation for this disparity in benefit is the age of the gun, but the Court should ask itself: Does the age of the gun make the trigger defect less dangerous? And, conversely, how does buying a Remington hat from the website address Class Member and public safety issues?

"Class actions certified solely for Settlement, particularly early in the case, sometimes make meaningful judicial review more difficult and more important." *Complex Litig. Manual (Fourth)* §21.612 (2004). Such Settlement Class actions require "closer judicial scrutiny than approval of Settlements reached only after Class certification has been litigated through the adversary process." *Id.* Moreover, there are "a number of recurring potential abuses in Class action litigation that judges should be wary of as they review proposed Settlements." *Id.*, §21.61. They include, among other things, conducting a "reverse auction," in which a defendant, seeing competing Class cases, cherry-picks the attorneys willing to accept the lowest Class recovery, in exchange for enhanced fees; the voluntary dismissal of Class claims for "strategic purposes," such as forum shopping or to obtain more favorable Settlement terms; cumbersome claims procedures that make it likely that many members will not claim benefits, particularly if the Settlement provides that the unclaimed portions of the fund will revert to the defendants; and releasing claims against parties who did not contribute to the Class Settlement. *Id.; see also id.* §21.271.

V. CONTRARY TO THE COMPLAINT,THIS GROSSLY INADEQUATE SETTLEMENT HAS PREJUDICED THE RIGHTS OF NON-CLASS MEMBERS, SUCH AS POLICE DEPARTMENTS

The original Class definition in the Complaint was defined as follows:

> All individuals in the State of Missouri that own or have owned a Remington Model 700 rifle originally manufactured and distributed with a Walker fire control mechanism. (emphasis added).

But, the definition of the Class in the proposed Settlement varied because additional Classes were added, and now each Class definition (A(1), A(2), A(3), A(4), B(1), and B(2)) excludes "governmental purchasers" from whatever benefits the Settlement may provide. This exclusion is buried in the fine print of Sections 33(c) and 34 (c) of the *Fourth Amended Settlement Agreement* and under FAQ #7 of the Long Form Notice.

In this case, it is clear that when the original *Complaint* was filed, police purchasers were included. In fact, Remington made a rifle specifically for police use,[31] called a 'Remington 700P". In *Garza*, as previously stated, police departments were included in the Settlement. While Class definitions are frequently expanded at Settlement to provide more absolution to a defendant, they are almost never narrowed from the original definition. The questions the Court should ask here is "Why?" and "How is that Proper?

[31] Although not all police departments bought that model.

One might infer that the reason that police departments were excluded from the final Settlement was the experience of Remington in *Garza*. In *Garza*, the most vociferous objector to the Settlement was the Pennsylvania State Police. Despite the fact that the Settlement was ultimately approved, the State Police of Pennsylvania raised important concerns about the adequacy of the monetary Settlement, leading to additional work for Remington and for the plaintiffs' counsel. Perhaps counsel in this case sought to avoid repeating that experience, but the exclusion of the largest bulk purchasers of these firearms raises more questions than it answers.

The now aligned Plaintiffs and Defense Counsel will perhaps note that the rights of police departments have not been compromised because the statute of limitations was tolled as to them by the filing of the initial *Complaint*, and they can, and likely will, file a separate governmental entity Class against Remington. The problem with that scenario, and the way in which the governmental entity purchasers' rights are compromised, is that it will likely be impossible short of a full-blown trial for governmental entities in a Class action to receive any greater benefits than the repair and coupons offered in this case. As the plaintiffs' counsel painstakingly pointed out in many documents, these triggers are extremely dangerous, they put the lives of serving police officers and the public they serve at risk, and a coupon that allows one to buy a $10.00 or $12.50 Remington product on the website does nothing to address the danger. The plain fact is that this grossly inadequate Settlement has prejudiced the rights even of non-Class members, such as the governmental entity purchasers.

In summary, the Court should observe that this case presents significant liability exposure to Remington, if litigated. Though it is unclear exactly what evidence Class Counsel had at the time of Settlement (they admit discovery in this case was limited), there is now available reams of documentary evidence, previously sealed through the efforts of Remington, posted on the Internet by Public Justice.[32] The admissions against interest and the calculated, Ford Pinto-like decisions of Remington in charting its reaction to the known defect in these rifles, create a very strong liability case against Remington. Assuming a liability finding at trial, a jury could easily award $100 per gun or approximately $750,000,000.

CONCLUSION

For each of the foregoing reasons, Messrs. Frost and Denney object to final approval of the Class action Settlement, and respectfully submits that the Court should not finally approve the Settlement or the request for attorneys' fees and costs. At minimum, prior to any decision granting final approval, the Objector requests the opportunity to take reasonable document and deposition discovery concerning the Settlement, including the claims rate, the actual Notice results,[33] and the attorneys' fees and costs sought by Settlement Class Counsel. Lastly, Messrs. Frost and Denney intend to appear at the February 14, 2017 Final Approval Hearing through his undersigned counsel and anticipate that they will need 1 hour to present their objections, exclusive of cross examination of other witnesses.

Dated: November 18, 2016

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[32] www.remingtondocuments.com

[33] See Hilsee Aff. Ex. D

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this 18th day of November, 2016, electronically filed and caused to be served upon all counsel of record the foregoing via the Court's CM/ECF system.

/s/ *Mark T. Kempton*
Mark T. Kempton

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